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DAVID McKAY, SHEILA McKAY and THE ESTATE OF JOHN McKAY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID McKAY, SHEILA McKAY and THE  
ESTATE OF JOHN McKAY,

Plaintiffs,

v.

CHRISTIAN HAGESETH, FRANK GRUICH,  
JR., GRUICH PHARMACY SHOPPE, JRB  
SOLUTIONS, INC., JRB HEALTH  
SOLUTIONS, LLC, BENJAMIN KREIS and  
GREG TUTTLE,

Defendants.

Case No. C 06 1377 MMC

STIPULATED PROTECTIVE ORDER

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as

1 confidential. The parties further acknowledge, as set forth in Section 10, below, that this  
 2 Stipulated Protective Order creates no entitlement to file confidential information under seal; Civil  
 3 Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards that will  
 4 be applied when a party seeks permission from the court to file material under seal.

## 5 2. LAW ENFORCEMENT EXCEPTION

6 This stipulated protective order does not apply to any information obtained during disclosure  
 7 or discovery activity which is sought by any district attorney, grand jury, law enforcement officer  
 8 or government agency.

## 9 3. DEFINITIONS

10 3.1. Party: any party to this action, including all of its officers, directors, employees,  
 11 consultants, retained experts, and outside counsel (and their support staff).

12 3.2 Disclosure or Discovery Material: all items or information, regardless of the medium or  
 13 manner generated, stored, or maintained (including, among other things, testimony, transcripts, or  
 14 tangible things) that are produced or generated in disclosures or responses to discovery in this  
 15 matter.

16 3.3 "Confidential" Information or Items: information (regardless of how generated, stored or  
 17 maintained) or tangible things that qualify for protection under standards developed under  
 18 F.R.Civ.P. 26(e), including but not limited to protection from annoyance, embarrassment,  
 19 oppression or undue burden or expense.

20 3.4 Receiving Party: a Party that receives Disclosure or Discovery Material from a  
 21 Producing Party.

22 3.5 Producing Party: a Party or non-party that produces Disclosure or Discovery Material in  
 23 this action.

24 3.6 Designating Party: a Party or non-party that designates information or items that it  
 25 produces in disclosures or in responses to discovery as "Confidential."

26 3.7 Protected Material: any Disclosure or Discovery Material that is designated as  
 27 "Confidential."  
 28

3.8 Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.

3.9 House Counsel: attorneys who are employees of a Party.

3.10 Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staff).

3.11 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action and who is not a past or a current employee of a Party or of a competitor of a Party and who, at the time of retention, is not anticipated to become an employee of a Party or a competitor of a Party. This definition includes a professional jury or trial consultant retained in connection with this litigation.

3.12 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

#### 4. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by parties or counsel to or in court or in other settings that might reveal Protected Material.

#### 5. DURATION

Even after the termination of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs.

#### 6. DESIGNATING PROTECTED MATERIAL

6.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or non-party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. A Designating Party must take care to designate for protection only those parts of material,

documents, items, or oral or written communications that qualify - so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process, or to impose unnecessary expenses and burdens on other parties), expose the Designating Party to sanctions.

If it comes to a Party's or a non-party's attention that information or items designated for protection do not qualify for protection at all, or do not qualify for the level of protection initially asserted, that Party or non-party must promptly notify all other parties that it is withdrawing the mistaken designation.

6.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g., second paragraph of section 6.2(a), below), or as otherwise stipulated or ordered, material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in documentary form (apart from transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL" at the top of each page that contains protected material. If only a portion or portions of the material on a page qualify for protection, the Producing Party also must clearly identify the protected portions (e.g., by making appropriate markings in the margins).

A Party or non-party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order, then, before producing the specified documents, the Producing Party

1 must affix the appropriate legend at the top of each page that contains Protected Material. If only  
 2 a portion or portions of the material on a page qualify for protection, the Producing Party also  
 3 must clearly identify the protected portions (e.g., by making appropriate markings in the margins).

4 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the Party or  
 5 non-party offering or sponsoring the testimony identify on the record, before the close of the  
 6 deposition, hearing, or other proceeding, all protected testimony. When it is impractical to  
 7 identify separately each portion of testimony that is entitled to protection, and when it appears that  
 8 substantial portions of the testimony may qualify for protection, the Party or non-party that  
 9 sponsors, offers, or gives the testimony may invoke on the record (before the deposition or  
 10 proceeding is concluded) a right to have up to 20 days after receipt of transcript to identify the  
 11 specific portions of the testimony as to which protection is sought. Only those portions of the  
 12 testimony that are appropriately designated for protection within the 20 days after receipt of the  
 13 transcript shall be covered by the provisions of this Stipulated Protective Order.

14 Transcript pages containing Protected Material must be separately bound by  
 15 the court reporter, who must affix to the top of each such page the legend "CONFIDENTIAL" as  
 16 instructed by the Party or non-party offering or sponsoring the witness or presenting the testimony.

17 (c) for information produced in some form other than documentary and for any other tangible  
 18 items, that the Producing Party affix in a prominent place on the exterior of the container or  
 19 containers in which the information or item is stored the legend "CONFIDENTIAL". If only  
 20 portions of the information or item warrant protection, the Producing Party, to the extent  
 21 practicable, shall identify the protected portions, specifying whether they qualify as  
 22 "CONFIDENTIAL."

23 6.3 Inadvertent Failures to Designate. An inadvertent failure to designate qualified  
 24 information or items as "CONFIDENTIAL" does not, standing alone, waive the Designating  
 25 Party's right to secure protection under this Order for such material. If material is appropriately  
 26 designated as "CONFIDENTIAL" after the material was initially produced, the Receiving Party  
 27 must make reasonable efforts to assure that the material is treated in accordance with the  
 28 provisions of this Order. The Producing Party must give notice to each Receiving Party that such

1 confidential information was inadvertently not so designated within 30 days of becoming aware  
 2 that the information was not properly designated. Subsequently, Receiving Party must mark the  
 3 information or items accordingly or return to the Producing Party for revision and return.

#### 4 7. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5 7.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's  
 6 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary  
 7 economic burdens, or a later significant disruption or delay of the litigation, a Party does not  
 8 waive its right to challenge a confidentiality designation by electing not to mount a challenge  
 9 promptly after the original designation is disclosed.

10 7.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating  
 11 Party's confidentiality designation must do so in good faith and must begin the process by  
 12 conferring directly (in voice to voice dialogue or written communications) with counsel for the  
 13 Designating Party. In conferring, the challenging Party must explain the basis for its belief that  
 14 the confidentiality designation was not proper and must give the Designating Party an opportunity  
 15 to review the designated material, to reconsider the circumstances, and, if no change in  
 16 designation is offered, to explain the basis for the chosen designation. A challenging Party may  
 17 proceed to the next stage of the challenge process only if it has engaged in this meet and confer  
 18 process first and only if it seeks judicial intervention within 30 days of the initial meet and confer  
 19 communication. This time may be extended by stipulation.

20 7.3 Judicial Intervention. A Party that elects to press a challenge to a confidentiality  
 21 designation after considering the justification offered by the Designating Party may file and serve  
 22 a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable)  
 23 that identifies the challenged material and sets forth in detail the basis for the challenge. Each  
 24 such motion must be accompanied by a competent declaration that affirms that the movant has  
 25 complied with the meet and confer requirements imposed in the preceding paragraph and that sets  
 26 forth with specificity the justification for the confidentiality designation that was given by the  
 27 Designating Party in the meet and confer dialogue.  
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The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Until the court rules on the challenge, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation.

#### 8. ACCESS TO AND USE OF PROTECTED MATERIAL

8.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of section 11, below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

8.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated CONFIDENTIAL only to:

(a) the Receiving Party's Outside Counsel of record in this action, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Agreement to Be Bound by Protective Order" that is attached hereto as Exhibit A;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(c) experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(d) the Court and its personnel;

(e) court reporters, their staff, and professional vendors to whom disclosure is reasonably necessary for this litigation;

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.

(g) the author of the document or the original source of the information.

9. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION. If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as "CONFIDENTIAL" the Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The Receiving Party also must immediately inform in writing the Party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that caused the subpoena or order to issue.

The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that court of its confidential material - and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL



1 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected  
 2 Material to any person or in any circumstance not authorized under this Stipulated Protective  
 3 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the  
 4 unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c)  
 5 inform the person or persons to whom unauthorized disclosures were made of all the terms of this  
 6 Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to  
 7 Be Bound" that is attached hereto as Exhibit A.

8 **11. FILING PROTECTED MATERIAL.**

9 Without written permission from the Designating Party or a court order secured after  
 10 appropriate notice to all interested persons, a Party may not file in the public record in this action  
 11 any Protected Material. A Party that seeks to file under seal any Protected Material must comply  
 12 with Civil Local Rule 79-5.

13 **12. FINAL DISPOSITION.**

14 Unless otherwise ordered or agreed in writing by the Producing Party, within sixty days after  
 15 the final termination of this action, each Receiving Party must return all Protected Material to the  
 16 Producing Party. As used in this subdivision, "all Protected Material" includes all copies,  
 17 abstracts, compilations, summaries or any other form of reproducing or capturing any of the  
 18 Protected Material. With permission in writing from the Designating Party, the Receiving Party  
 19 may destroy some or all of the Protected Material instead of returning it. Whether the Protected  
 20 Material is returned or destroyed, the Receiving Party must submit a written certification to the  
 21 Producing Party (and, if not the same person or entity, to the Designating Party) by the sixty day  
 22 deadline that identifies (by category, where appropriate) all the Protected Material that was  
 23 returned or destroyed and that affirms that the Receiving Party has not retained any copies,  
 24 abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected  
 25 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all  
 26 pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product,  
 27 even if such materials contain Protected Material. Any such archival copies that contain or  
 28

1 constitute Protected Material remain subject to this Protective Order as set forth in Section 4  
 2 (DURATION), above.

3 13. MISCELLANEOUS

4 13.1 Right to Further Relief. Nothing in this Order abridges the right of any person to  
 5 seek its modification by the Court in the future.

6 13.2 Right to Assert Other Objections. By stipulating to the entry of this Protective  
 7 Order no Party waives any right it otherwise would have to object to disclosing or producing any  
 8 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no  
 9 Party waives any right to object on any ground to use in evidence of any of the material covered  
 10 by this Protective Order.

11 13.3 Authority of Court. Any violation of the terms of this Protective Order may result  
 12 in the imposition of such relief as the Court deems appropriate.

13 13.4 Retention of Jurisdiction All provisions of this Order restricting the  
 14 communication of use of items or information subject to protection pursuant to this Protective  
 15 Order shall continue to be binding after the conclusion of this action, including all appeals unless  
 16 otherwise agreed or ordered. The Court shall retain jurisdiction to enforce this Protective Order  
 17 beyond the conclusion of this litigation.

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IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Dated: April 11, 2007

WALKUP, MELODIA, KELLY,  
WECHT & SCHOENBERGER

Emily C. Wecht for  
MELINDA T. DERISH  
Attorney for Plaintiffs

Dated:

MURPHY, PEARSON, BRADLEY &  
FEENEY

JORDANA BOAG, ESQ.  
AARON K. MCCLELLAN  
Attorney for Defendant JRB Health Solutions,  
LLC, Gregg Tuttle and Benjamin Kreis

Dated: April 11, 2007

CARROLL, KELLY, TROTTER, FRANZEN  
AND MCKENNA

Cheryl B. Franzen  
MARK V. FRANZEN  
DMITRIY CHEREPINSKIY  
Attorneys for defendants Frank Gruich Jr., and  
Gruich Pharmacy Shoppe

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: April 17, 2007

Bernard J. Zimmerman  
United States District Judge  
Magistrate